



0000096774

ORIGINAL

BEFORE THE ARIZONA CORPORATION COMMISSION

MARC SPITZER

CHAIRMAN

MIKE GLEASON

COMMISSIONER

JEFF HATCH-MILLER

COMMISSIONER

JIM IRVIN

COMMISSIONER

WILLIAM A. MUNDELL

COMMISSIONER

ARIZONA CORPORATION COMMISSION
Complainant,

v.

QWEST CORPORATION,

Respondent

2003 JAN 17 P 12: 24

AZ CORP COMMISSION
DOCUMENT CONTROL

DOCKET NO. T-0000A-00-0194

IN THE MATTER OF THE
INVESTIGATION INTO
QWEST CORPORATION'S
COMPLIANCE WITH
CERTAIN WHOLESALE
PRICING REQUIREMENTS
FOR UNBUNDLED
NETWORK ELEMENTS AND
RESALE DISCOUNTS

and

DOCKET NO. T-0105B-02-0871

COMPLAINT
AND

Arizona Corporation Commission

ORDER TO SHOW CAUSE

DOCKETED

JAN 17 2003

MOTION FOR INJUNCTION

DOCKETED BY

CA

Mountain Telecommunications, Inc. ("MTI"), by its attorneys, pursuant to A.R.C. R14-3-106 and Rule 65 of the Arizona Rules of Civil Procedure (16 Ariz. Rev. Stat., Rules of Civil Procedure, Rule 65), hereby files this Motion for an Injunction to enjoin Qwest Corporation ("Qwest") from charging unjust and unreasonable prices to MTI for unbundled network elements. MTI further requests the Commission to stay the effective date of the interim rules for pricing transport facilities established in Decision No. 64922, issued June 12, 2002, until such time as the Commission issues final rules regarding the pricing of transport facilities.¹

¹ In the Matter Of Investigation Into Qwest Corporation's Compliance With Certain Wholesale Pricing Requirements For Unbundled Network Elements and Resale Discounts, Docket No. T-0000A-00-0194 (*Phase II*) ("Qwest Wholesale Pricing Decision" or "Decision No. 64922").

On January 9, 2003, MTI filed applications to intervene in each of the above-captioned proceedings. As of the date of this motion, MTI's applications to intervene remain pending. For the reasons stated in the applications to intervene, MTI believes that the Commission will grant its applications. However, in the event that the Commission disagrees with MTI's position, MTI respectfully requests the Commission to exercise its discretion under Section 40-252 of the Arizona Revised Statutes to rescind, alter or amend Decision No. 64922 so as to stay the effective date of the interim rules for pricing transport facilities pending the Commission's determination of final rules regarding the pricing of transport facilities.

STATEMENT OF FACTS

MTI is a telecommunications carrier certificated by the Commission to provide services, including competitive local exchange services, in the State of Arizona. MTI is incorporated under the laws of the State of Arizona, and its corporate headquarters are located at 1430 W. Broadway, Suite A-200, Tempe, Arizona 85282.

As a provider of telecommunications services, MTI utilizes network elements of Qwest Communications, the predominant incumbent local exchange carrier (ILEC) in Arizona which it acquires on an unbundled basis pursuant to Section 251(c)(3) of the Communications Act of 1934, as amended (47 U.S.C. § 251(c)(3)) and subject to an interconnection agreement approved by the Commission. MTI is especially reliant on the transport facilities of Qwest, as well as Qwest's Local Interconnection Service. MTI uses Qwest transport to connect its customers' premises with serving wire centers and to move telecommunications traffic between central offices within Qwest territory.

On June 12, 2002, the Commission issued the Qwest Wholesale Pricing Decision. In that decision, which is known as Phase II of the proceeding in Docket No. T-00000A-00-0194, the

Commission adopted new rates to be charged by Qwest for unbundled network elements and resale. Regarding transport, the Commission adopted the results of the HAI model for development of transport rates, notwithstanding its concern that rates based on that model might not be appropriate. The Commission further stated:

[a]lthough we are adopting the HAI model's results at this time, we believe that this issue should be re-examined in Phase III so that a full record may be developed. . . . In Phase III, Qwest should provide the parties, through discovery, the wire center specific information necessary for the CLECs to determine how the HAI model can be deaveraged into appropriate fixed and per mile components.²

Therefore, the issue of appropriate modeling for establishment of transport rates will be re-examined based on a full record in Phase III of the proceeding.

Although the rates for network elements, interconnection and resale mandated by the Qwest Wholesale Pricing Decision were to be effective on June 12, 2002, Qwest has delayed implementing those rates for many months. Indeed, that delay led to Commission Staff filing a Complaint and Order to Show Cause on November 26, 2002 requesting that Qwest be ordered to show cause why its failure to implement the rates required by Decision No. 64922 is not unreasonable and why it should not be held in contempt. By Decision No. 65450 issued December 12, 2002, Qwest has been ordered to show cause.

As a CLEC operating in Arizona, MTI is reliant on access to Qwest unbundled network elements at prices approved by the Commission based upon the Total Element Long Run Incremental Cost (TELRIC) standard promulgated by the Federal Communications Commission (FCC). It is clear from the Commission's language in the Qwest Wholesale Pricing Decision that the record compiled to date is not sufficient to conclude that transport rates and the rates for Local Interconnection Service based on the HAI model will produce lawful rates in accordance

² Decision No. 64922, at 79.

with Section 251 of the Communications Act of 1934, as amended,³ and the FCC's TELRIC standard.

Due to Qwest's prolonged delay in implementing Decision No. 64922, MTI only recently has begun to receive invoices from Qwest containing charges for transport based upon Qwest's understanding and implementation of that decision. Indeed, MTI received its first such invoice on or about January 2, 2003. Upon receipt of that invoice, MTI was surprised and disappointed to learn that Qwest's charges to it for transport service and for Local Interconnection Service are significantly higher than the previously-applicable charges for that service. Indeed, those ostensibly TELRIC-based charges are even higher – in some cases substantially higher – than the charges for the identical facilities when purchased pursuant to Qwest's interstate access service tariff (Tariff FCC No. 1) on file with the FCC. For example, Qwest's invoice received in the first week of January 2003, included a monthly charge of \$1,834.61 for a six mile DS3 circuit. Qwest had been previously charging MTI \$353.05 per month for the identical circuit. MTI estimates that the increased monthly charge for transport and local interconnection service will increase MTI's costs by \$54,866.60 per month.

While Qwest has implemented substantial price increases for transport service, it continues to delay its implementation of price decreases for other network elements mandated by the Commission in Decision No. 69422. For example, in invoices received on January 10, 2003, Qwest incorporated the rate changes for unbundled loops only for recurring charges on new circuits installed in December 2002. The nonrecurring (installation) charge for local loops failed to reflect the new rates set forth in Decision No. 64922. Therefore, MTI is being charged an amount significantly higher than that permitted in the Qwest Wholesale Pricing Decision.

³ 47 U.S.C. § 251.

Qwest's massive rate increases for transport, as well as Qwest's continued and unjustified delay in implementing new lower rates for local loops, are inconsistent with the Commission's intent in Decision No. 64922 and violate the statutory requirements codified at Section 252(d)(1)(A) of the Communications Act that unbundled network element rates must be based on cost (without reference to rate of return or other rate-based proceeding), must be nondiscriminatory, and may include a reasonable profit.⁴ Neither do the rates charged for transport conform with the FCC's TELRIC standard. Continued imposition on MTI of the transport rates and local loop rates reflected in Qwest's recent invoices will make it uneconomic for MTI to offer competing local telecommunications services through use of unbundled network elements as it is statutorily entitled to do, and may have the unintended consequence of forcing MTI to exit the local service marketplace in Arizona. Therefore, MTI requests the Commission to issue an order enjoining Qwest from charging unjust and unreasonable prices to MTI for unbundled network elements. Specifically, MTI seeks an order requiring Qwest to comply with Decision No. 64922 concerning the rates for local loops and granting a stay of the effective date of the interim rules governing Qwest's rates for transport pending resolution of the transport pricing issues in Phase III of the proceeding in Docket No. T-00000A-00-0194.

ARGUMENT

In evaluating a motion for injunctive relief, the Commission must consider four factors: 1) whether the applicant has made a strong showing of likelihood of success on the merits; 2) whether the applicant will be irreparably injured absent an injunction; 3) whether grant of the injunction will substantially injure other interested parties; and 4) where the public interest lies. See Overstreet v. Thomas Davis Medical Centers, P.C., 978 F. Supp. 1313 (D. Ariz. 1997); see

⁴ 47 U.S.C. § 252(d)(1)(A).

also Motion of Ranger Cellular and Miller Communications, 17 FCC Rcd 9320, ¶ 5 (citing Virginia Petroleum Jobbers Ass'n v. Federal Power Comm'n, 259 F.2d 921, 925 (D.C. Cir. 1958)). The standard for evaluating requests for injunctions is the same as the standard used for evaluating requests for stays. See Lopez v. Heckler, 713 F.2d 1432, 1435 (9th Cir. 1983).

The Ninth Circuit uses two tests to determine whether an injunction or stay should be issued: the traditional test described above and a less stringent alternate test. The alternate test requires the moving party to show: “1) a combination of probable success on the merits and the possibility of irreparable injury; or 2) that serious questions are raised, the balance of hardship tips sharply in the movant’s favor and the movant has a fair chance for success on the merits.” Pentax Corporation v. Myhra, 182 F.R.D. 458, 462 (9th Cir. 1994). An injunction or stay may be issued under either test. Id. (citing National Wildlife Federation v. Coston, 773 F.2d 1513, 1517 (9th Cir. 1985)).

In this case, MTI has made a substantial showing on all four factors in the traditional test, as well as on the requirements of the alternate test, that mandates the Commission’s grant of MTI’s request for an injunction.

I. THERE IS A STRONG LIKELIHOOD OF SUCCESS ON THE MERITS.

The first factor of the four-part test for injunctive relief requires a petitioning party to make a showing that the petitioner has a substantial likelihood of prevailing on the merits of the underlying case. In this instance, MTI’s likelihood of success on the merits is strong.

Section 201(b) of the Communications Act provides that any “charge, practice, classification, or regulation [for and in connection with the provision of interstate communications service] that is unjust or unreasonable is hereby declared to be unlawful.” 47 U.S.C. § 201(b). Furthermore, Section 40-361 of Arizona’s Revised Statutes mandates that

“[c]harges demanded or received by a public service corporation for any commodity or service shall be just and reasonable. Every unjust and unreasonable charge demanded or received is prohibited and unlawful.” Qwest’s implementation of Decision No. 64922 has resulted in unjust and unreasonable charges to MTI. Moreover, Qwest’s implementation of Decision No. 64922 is inconsistent with the purpose of that decision. In Decision No. 64922, the Commission stated:

it is our duty and our goal in this proceeding to set prices for interconnection and network elements at a level that fairly compensates Qwest and allows CLECs that operate as efficient providers to compete, thereby bringing competitive choices to the intended beneficiaries of the 1996 Act, the end-user customer.⁵

The rate changes mandated in Decision No. 64922 were to have been effective immediately on June 12, 2002. Commencing January 2003, Qwest began charging MTI rates for transport that are purportedly in accordance with the HAI model. However these rates are more than five times higher than the rates that were previously charged by Qwest for the identical service. This result is directly contrary to the purpose of the Qwest Wholesale Pricing Decision, which was to fairly compensate Qwest while facilitating competition in the provision of telecommunications services. MTI asserts that it is highly improbable that Qwest’s cost of providing transport to MTI increased five-fold from Qwest’s previous transport rate. Qwest’s insistence on charging a drastically increased and exorbitant rate for transport is neither just nor reasonable. While Qwest has determined a way to increase MTI’s transport rates, Qwest has failed to implement the rate changes for local loops required by Decision No. 64922. As a result, MTI is subject to dramatically increased transport charges, while it is denied the benefit of decreased local loop charges as was intended by Decision No. 64922. Therefore, MTI is subject to increased costs which make it uneconomic for MTI to continue providing competitive service

⁵ Decision No. 64922, at 81.

in Arizona. Such a result is directly contrary to the goal of Decision No. 64922, which was to bring competitive choices to end users.

In conclusion, MTI has demonstrated that there is a substantial likelihood that the Commission will find that Qwest is engaging in an unjust and unreasonable practice in violation of Section 201(b) of the Communications Act and Section 40-361 of Arizona's Revised Statutes.

II. MTI WILL SUFFER IRREPARABLE HARM IF INJUNCTIVE RELIEF IS NOT GRANTED.

The second factor requires a petitioner to show that irreparable injury will be suffered unless the injunction is issued. "In order to meet this burden [petitioners] need to establish that at the time of the injunction it was under a substantial '... threat of harm which cannot be undone . . .' through monetary remedies." Speigel v. Houston, 636 F.2d 997, 1001 (5th Cir. 1981). "Generally, destruction of a business constitutes irreparable harm sufficient to warrant the granting of an injunction provided the other three elements [for granting injunctive relief] . . . are met." Perpetual Bldg. Limited Partnership v. District of Columbia, 618 F. Supp. 603, 616 (D.D.C. 1985); see also Washington Metropolitan Area Transit Comm'n v. Holiday Tours, Inc., 559 F.2d 841 (D.C. Cir. 1977).

MTI will suffer irreparable harm if Qwest is not prevented from charging MTI unjustly and unreasonably high amounts for transport facilities. MTI has estimated that the increased monthly transport charges (which represents more than five times Qwest's previous rate for transport) will cause MTI's monthly cost of providing service to increase by over \$54,000 based upon its current requirements. As MTI's business grows, the amount of these excessive transport charges will increase. This increase will negatively impact MTI's ability to provide telecommunications service to its customers and make it uneconomical for MTI to continue to provide competitive local telecommunications service. Such pricing increases could result in

limiting the services which MTI can economically offer to consumers. As such, MTI would be irreparably harmed if Qwest is permitted to charge MTI for transport at its current rate.

III. THERE WILL BE NO HARM TO QWEST IF INJUNCTIVE RELIEF IS GRANTED.

Factor three of the four-part test for injunctive relief requires a petitioner to show that the threatened injury to the petitioner outweighs any damage the proposed injunction may cause to the opposing party. In contrast to the irreparable harm that will be suffered by MTI if Qwest is permitted to charge exorbitant and unjustifiable amounts for transport, while refusing to implement price decreases for local loops as required by Decision No. 64922, Qwest will not suffer any injury if an injunction is granted. MTI will pay Qwest in full for all transport services at the previous rates charged for those services and MTI will pay Qwest for local loops at the rates mandated by Decision No. 64922. A Commission order requiring Qwest to charge the transport rate it had been charging and requiring Qwest to comply with the Qwest Wholesale Pricing Decision regarding the pricing of local loops would not harm Qwest in any manner. In fact, if Qwest is permitted to continue to be able to charge MTI at unreasonably high rates, it will receive an unjust enrichment. Given that no harm will result to Qwest if the injunction is granted, the balance of hardships favors MTI in this case.

IV. THERE IS A SIGNIFICANT PUBLIC INTEREST IN COMPETITION WITHIN THE MARKET FOR LOCAL TELECOMMUNICATIONS SERVICES.

Finally, factor four of the test for injunctive relief requires a petitioner to show that the injunction will not be adverse to public interest. MTI's receipt of transport service from Qwest is essential to MTI's provision of basic telecommunications services to MTI's customers in Arizona. Qwest's continued charging of exorbitant transport rates to MTI will cause MTI to be economically unable to provide telecommunications service to end-users. The loss of a competing provider of

service is contrary to the goal of Decision No. 64922, which is to encourage competition in order to provide consumers with competitive choices. Furthermore, as explained in Section I of this Argument, Qwest's actions violate Section 201(b) of the Communications Act and Section 40-361 of the Arizona Revised Statutes. There is a strong public interest benefit in having carriers engage in lawful activities and comply with their legal obligations.

CONCLUSION

Based on the foregoing, MTI respectfully requests the Commission to grant MTI's Motion for Injunction and alternative request that the Commission stay the effective date of the interim rules regarding the pricing of transport facilities pending the Commission's determination of final rules governing transport pricing.

Respectfully submitted,

MOUNTAIN TELECOMMUNICATIONS, INC.



Robert S. Kant
E. Jeffrey Walsh

GREENBERG TRAURIG, LLP
2375 East Camelback Road
Suite 700
Phoenix, Arizona 85016
(602) 445-8000

Its Attorneys

Of Counsel:

Mitchell F. Brecher
Debra McGuire Mercer
GREENBERG TRAURIG, LLP
800 Connecticut Avenue, NW
Washington, DC 20006
(202) 331-3100

January 16, 2003

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing Motion for Injunction on all parties of record in this proceeding by mailing a copy thereof, properly addressed with first class postage prepaid to the following:

Timothy Berg
FENNEMORE CRAIG
3003 North Central Avenue
Suite 2600
Phoenix, AZ 85012

QWEST Corporation
1801 California Street
Suite 5100
Denver, CO 80202

Richard S. Wolters
Michel Singer Nelson
AT&T
1875 Lawrence Street
Room 1575
Denver, CO 80202-1847

Michael W. Patten
ROSHKA, HEYMAN & DEWULF
One Arizona Center
400 East Van Buren Street
Suite 800
Phoenix, AZ 85004
Attorneys for Cox Arizona Telecom, Inc.,
e-spire™ Communications, and McLeodUSA Telecommunications Services, Inc.

Michael Grant
GALLAGHER & KENNEDY
2575 East Camelback Road
Phoenix, AZ 85016-9225
Attorneys for Electric Lightwave, Inc., COVAD
Communications, Inc. and New Edge Networks

Thomas H. Campbell
LEWIS & ROCA
40 North Central Avenue
Phoenix, AZ 85007
Attorneys for Rhythms Links, Inc. and
Time Warner Telecom of Arizona, LLC

Thomas F. Dixon, Jr.
MCI WorldCom
707 17th Street
Denver, CO 80202

Darren S. Weingard
Stephen H. Kukta
SPRINT COMMUNICATIONS CO.
1850 Gateway Drive
7th Floor
San Mateo, CA 94404-2467

Scott S. Wakefield
RUCO
2828 North Central Avenue
Suite 1200
Phoenix, AZ 85004

Raymond S. Heyman
Randall H. Warner
ROSHKA, HEYMAN & DeWULF
400 East Van Buren Street
Suite 800
Phoenix, AZ 85004

Jeffrey W. Crockett
Jeffrey B. Guldner
SNELL & WILMER
One Arizona Center
Phoenix, AZ 85004-2202

Mary E. Steele
DAVIS WRIGHT TREMAINE LLP
2600 Century Square
1501 Fourth Avenue
Seattle, WA 98101-1688
Attorneys for AT&T Communications of the Mountain States, Inc.

Marti Allbright
MPOWER COMMUNICATIONS
5711 South Benton Circle
Littleton, CO 80123

Kevin Chapman
Director-Regulatory Relations
5800 Northwest Parkway
Suite 125, Room I-S-20
San Antonio, TX 78249

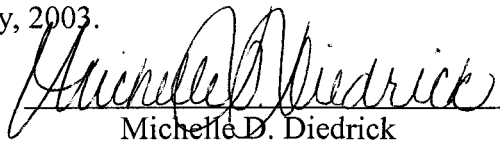
Joyce B. Hundley
United States Department of Justice
Antitrust Division
City Center Building
1401 H Street, NW
Suite 8000
Washington, D.C. 20530

Lyndon J. Godfrey
AT&T
795 Folsom Street
Suite 2104
San Francisco, CA 94107

Christopher Kempley, Chief Counsel
LEGAL DIVISION
1200 West Washington Street
Phoenix, AZ 85007

Ernest G. Johnson, Director
UTILITIES DIVISION
1200 West Washington Street
Phoenix, AZ 85007

Dated at Washington, D.C., this 16th day of January, 2003.


Michelle D. Diedrick